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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JUST IN CASE, INC.,

Plaintiff and Respondent,

v.

VIRTUAL ELECTRONICS  
MANUFACTURING, INC., et al.,

Defendants and Appellants.

B205897

(Los Angeles County  
Super. Ct. No. BC361147)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Rolf M. Treu, Judge. Affirmed.

Law Office of Thomas H. Edwards and Thomas H. Edwards for Defendants  
and Appellants.

Clark & Trevithick and Philip W. Bartenetti for Plaintiff and Respondent.

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This appeal requires us to interpret a settlement agreement. The trial court found that appellants breached their promise to deliver 100,000 “good and acceptable” condoms to respondent. Because the undisputed evidence shows that the condoms had holes, we conclude that they were not “good and acceptable.” The delivery of the condoms was both a promise to render future performance and a condition precedent to the dismissal of the parties’ underlying litigation. We also conclude the breach of the promise to deliver the condoms was not extinguished by a release. We affirm the judgment.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Marsha Graham founded Just In Case, Inc. (JIC) to market a cosmetic case with a concealed compartment designed to contain two condoms. JIC’s purpose was to provide a product for women that would prevent sexually transmitted diseases and unplanned pregnancies. JIC is the respondent in this appeal.

Marc Weinmann is a principal in Virtual Electronics Manufacturing, Ltd. and Virtual Electronics Manufacturing, Inc. (collectively VEM). VEM sells machine tools that are manufactured in China. VEM and Weinmann are appellants.

#### *1. The Parties’ Business Dealings*

JIC agreed to purchase injection moldings (a tool for molding plastic into a specified shape) and 300,000 custom packaged condoms from VEM. Prior to entering the purchase agreement for the condoms, JIC informed VEM of requirements by the Food and Drug Administration (FDA) for the importation of condoms into the United States. Information from the FDA that JIC sent VEM made clear that “[v]irtually all shipments of condoms coming into the U.S. are sampled and tested.” Marsha Graham testified that FDA approval was important to JIC.

Once JIC agreed to purchase the condoms from VEM, VEM in turn contracted with Guilin Latex Factory (Guilin) in China for the purchase of the condoms. Guilin warranted that the condoms would comply with the standard promulgated by the World Health Association known as ISO 4074-2002. According to VEM, “[t]his is one of the quality standards accepted by the FDA that is referred to in the materials from the FDA that JIC had . . . forwarded to VEM.” The World Health Organization limits the acceptable defects for “performance properties, such as freedom from holes” to 0.25 percent. (World Health Org., *The Male Latex Condom: Specification and Guidelines for Condom Procurement* (2004) p. 8.) Tests “assess the barrier properties of the package, the integrity of the product and the ability to resist breakage.” (*Id.* at p. 15.)

## 2. *The First Dispute*

The parties disputed the quality of the injection moldings. On October 7, 2005, JIC filed a lawsuit, in Los Angeles Superior Court against VEM and Marc Weinmann, alleging causes of action for breach of contract, negligent misrepresentation, and conversion.<sup>1</sup> The allegations concerned the manufacture of the specialty cosmetic case, not the purchase of condoms. However, around the same time, JIC was concerned that the labels on the condom packages did not appropriately show its logo.

The parties agreed to resolve their disputes and signed a settlement agreement (referred to as the settlement agreement or the agreement).

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<sup>1</sup> At our request, appellant augmented the record to include the complaint in the underlying litigation, Los Angeles Superior Court case No. BC 341128. Judicial notice of the complaint is appropriate under Evidence Code section 452, subdivision (d).

### 3. *The Parties' Settlement Agreement*

The pertinent provisions of the settlement agreement follow:

“It is the desire of the parties to this Release to resolve all disputes underlying or in any way connected with or related to Action No. BC341128 and to release all parties to the litigation, their officers, directors, principals, agents, heirs, representatives, assigns, and employees, from any and all rights, claims, demands, and damage of any kind, known or unknown, existing or arising in the future, resulting from or related to any and all liability in connection with any such disputes.

“1. Upon the execution of this Release, Defendants shall:

“(a) ship a minimum of 100,000 good and acceptable condoms to: [JIC's new injection molding manufacturer in Taiwan.]

“Defendants have represented the product is in the hands of the shipping company. Defendants have been told by the shipper that the product should reach its destination by no later than December 24, 2005.

“(b) supply to VEM through its counsel the material that documents the FDA approval and all necessary clearances for the distribution of the condoms in the United States, and

“(c) destroy the tool and peripheral items referred to in Action No. BC341128.

“2. Immediately upon receiving the materials described in paragraph 1(a) and (b) above, and written assurance of the completion of 1(c), Plaintiff will file a Request for Dismissal of the action, with prejudice.

“3. Plaintiff and Defendants hereby release and discharge one another and their respective officers, directors, principals, agents, heirs, representatives, assigns, and employees of and from any and all claims, demands, sums of money, actions, rights, causes of action, obligations and liabilities of every kind or nature

whatsoever which they have had, or claim to have had, or now have, or now claim to have, whether or not such claims arose out of, or were, or are in any manner connected with the facts recited above or referred to in Action No. BC341128.

“[¶] . . . [¶]

“5. . . . Each party assumes the risk of any mistake of fact on his/its part in connection with the true facts involved herein and with regard to any facts which are now unknown by him/it. In this connection, all rights under §1542 of the California Civil Code are hereby expressly waived by the parties. Such statute provides as follows: [¶] ‘A general release does not extend to claims which the creditor does not know of or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.’

“6. Thus, notwithstanding the provisions of § 1542, and for the purpose of implementing a full and complete release and discharge, the parties expressly acknowledge that this Release is intended to include in its effect, without limitation, all claims which any party does not know or suspect to exist in his/its favor at the time of the execution hereof, and that this Release contemplates the extinguishment of any such claim or claims.

“[¶] . . . [¶]

“10. This Release is made and entered into in the State of California, and shall in all respects be interpreted, enforced and governed under the laws of the State of California. The language of all parts of this Release shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the parties.”

#### 4. *Events Subsequent to the Parties' Settlement*

On December 22, 2005, VEM shipped 134,842 condoms to JIC's new injection molding manufacturer in Taiwan. JIC verified the quantity but did not inspect the condoms. Paragraph 1(b) of the settlement agreement refers to a letter from the FDA to Guilin, authorizing it to begin marketing its condoms in the United States. This letter was provided by VEM to JIC. VEM advised JIC that it had destroyed the peripheral items referred to in the underlying litigation in December 2005 as required by paragraph 1(c).

The request for dismissal of the underlying litigation was signed by JIC's counsel on January 5, 2006 and filed with the Los Angeles Superior Court on January 9, 2006.

On April 20, 2006, one set of condoms passed FDA inspection. On June 21, 2006, the FDA refused admission of 39,000 condoms that had been supplied under the terms of the settlement agreement. The FDA tested approximately 500 of the condoms and determined that the condoms had holes in them.

JIC notified VEM of the FDA's finding and requested VEM's assistance. VEM responded: "[A]nything involved with the condoms was resolved by the Mutual and General Release." JIC caused the rejected condoms to be destroyed. JIC also destroyed or was in the process of destroying the condoms from the shipment that passed inspection because they were from the same lot number.<sup>2</sup> JIC eventually purchased generic condoms, i.e., those without a JIC label, and placed them in the cosmetic cases.

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<sup>2</sup> "A LOT is a collection of condoms of the same design, colour, shape, size and formulation. A LOT must be manufactured at essentially the same time using the same process, same specification of raw materials, common equipment, same lubricant and any other additive or dressing, in the same type of individual container." (World Health Org., *The Male Latex Condom: Specification and Guidelines for Condom Procurement* (2004) pp. 7-8.)

## 5. *The Current Dispute*

JIC sued VEM and Weinmann alleging a single cause of action for breach of the settlement agreement. The alleged breach was VEM's failure to ship 100,000 good and acceptable condoms. The case was tried to the court.

The court asked VEM's counsel if he was conceding that the condoms were not "good and acceptable." Counsel stated, "[i]n ordinary usage, a condom that leaks would not . . . if they had known the condoms had leaked, obviously they would not have accepted them. But the effect of a general release is that you're giving up unknown claims." VEM's counsel also stated: "And once they had an opportunity to inspect them and they went forward and accepted them and dismissed the lawsuit, the risk of loss shifted to them. That's the nature of a general release. You take on the risk of an unknown claim." To the court's observation that "[t]he condoms in question were not good and acceptable, subject to the other arguments that you're making," VEM's counsel responded, "I think so, Your Honor."

The trial court, in its statement of decision, concluded VEM had conceded the condoms were not "good and acceptable." The court found VEM had breached its obligation to provide 100,000 "good and acceptable condoms" and, as a result, JIC suffered \$30,793.13 in damages. The court further concluded that the waiver of the protections under Civil Code section 1542 did not "shield" VEM because the obligation to provide good and acceptable condoms was an independent obligation.

On November 28, 2007, judgment was entered in the amount of \$30,793 plus costs in the amount of \$18,286.79. VEM and Weinmann appeal.

## **DISCUSSION**

Appellants argue that (1) the condoms were "good and acceptable"; (2) the delivery of "good and acceptable" condoms was a condition to the dismissal of the lawsuit; (3) even if the condoms were not "good and acceptable," any claim was

extinguished by the release; and (4) JIC was required to decide whether the condoms were acceptable at the time of delivery. Appellants do not challenge the amount of damages.

1. *Principles of Contract Interpretation*

General principles of contract interpretation apply to settlement agreements. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.) The overarching goal is to give effect to the mutual intention of the parties. (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 647.) Civil Code section 1636 provides: “A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.” The language of a contract governs its interpretation if the language is clear and explicit, and when possible, the intention of the parties is to be ascertained from the writing alone. (Civ. Code, §§ 1638, 1639.) Where an agreement is ambiguous, parol evidence is admissible to clarify the ambiguity and determine the parties’ intent. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 39-40.)

“The interpretation of a written instrument, even though it involves what might properly be called questions of fact . . . is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. [Citations.] Extrinsic evidence is ‘admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible’ [citations], and it is the instrument itself that must be given effect. [Citations.] It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence. Accordingly, ‘[a]n appellate court is not bound by a construction of the contract based solely upon the terms of the written instrument without the aid of evidence [citations], where there is no conflict in the evidence [citations], or a

determination has been made upon incompetent evidence [citation].” (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861,865; see also *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395.)

Where, as here, no conflicting extrinsic evidence was admitted, the interpretation of a contract is a question of law. (*City of Hope National Medical Center v. Genetech, Inc.*, *supra*, 43 Cal.4th at p. 395.) This court reviews a contract de novo if the extrinsic evidence is not in conflict, even if conflicting inferences may be drawn from the evidence. (*Winet v. Price*, *supra*, 4 Cal.App.4th at p. 1166, fn. 3.)

## 2. *VEM Did Not Deliver 100,000 Good and Acceptable Condoms*

VEM argues the trial court erred in finding it conceded the condoms were not “good and acceptable.” We disagree. Even without the concession, we would conclude condoms with holes that were ordered destroyed were not “good and acceptable.”

VEM’s counsel conceded the condoms were not “good and acceptable” when he agreed with the following statement made by the court: “So there is no dispute over the term ‘good and acceptable.’ The condoms in question were not good and acceptable, subject to the other arguments that you’re making.” By agreeing with the trial court, VEM admitted as accurate the statement that the condoms were not “good and acceptable.” In addition, VEM’s counsel acknowledged: “[i]n ordinary usage, a condom that leaks would not . . . if they had known the condoms had leaked, obviously they would not have accepted them.” This statement indicates that VEM recognized a condom that leaks is not “good and acceptable.”

Even absent VEM’s concession, no reasonable construction of the settlement agreement supports VEM’s implicit argument that the condoms were “good and acceptable.” A condom “is a sheath worn over the male sexual organ to prevent

conception or venereal infection during sexual activity.” (*Ansell, Inc. v. Schmid Laboratories, Inc.* (D.N.J. 1991) 757 F.Supp. 467, 469.) The condoms in this case were designed to comply with the World Health Organization standard. According to the World Health Organization, “[a] condom with a hole in it is clearly defective.” (World Health Org., *The Male Latex Condom: Specification and Guidelines for Condom Procurement* (2004) p. 74.) Additionally, even if, as VEM argues, the condoms were required to be acceptable only to JIC, a perforated condom necessarily undermined JIC’s purpose to make a product for women that would prevent sexually transmitted diseases and unplanned pregnancies. Defective condoms, by definition, are not “good and acceptable.”

There is a second reason why the condoms cannot be described as “good and acceptable” – the FDA ordered them destroyed. Graham testified that FDA approval of the condoms was important, and her testimony was undisputed. Prior to entering a purchase order with VEM, JIC and VEM had discussions about the FDA requirements for condoms entering the United States, and Guilin provided VEM with documentation that it had received FDA approval. When JIC attempted to import the second shipment, the FDA tested the condoms and ordered that all of the condoms be destroyed, not just the sample of 500. It was undisputed that all of the condoms were from the same lot.<sup>3</sup> Thus, even absent the concession by VEM’s counsel, we would conclude that VEM did not deliver 100,000 “good and acceptable” condoms as required by the settlement agreement.

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<sup>3</sup> There is no need to consider whether a warranty should apply. The condoms did not meet the agreement’s requirement that they be “good and acceptable.”

3. *The Obligation to Deliver 100,000 Good and Acceptable Condoms Was Both a Condition and a Promise*

VEM asserts that its obligation to deliver 100,000 good and acceptable condoms was a condition precedent to JIC's obligation to dismiss the underlying suit, not an independent covenant, and that JIC's dismissal of the underlying lawsuit operated as an acknowledgment that the condition had been met. We disagree.

As Witkin observes, "the same fact or act may be both a condition and a promise, resulting in both an excuse of counterperformance and a right of action for damages." (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 778 p. 868; 8 Corbin on Contracts (rev. ed. 1999) § 30.12, p. 24; *Call v. Alcan Pacific Co.* (1967) 251 Cal.App.2d 442, 447.) A promise is an expression of intention to render some future performance. (8 Corbin on Contracts (rev. ed. 1999) § 30.12, p. 22.) Here, the term "shall," precedes the description of VEM's obligation to deliver the condoms, indicating VEM's intention to render future performance. The failure of VEM to comply with its obligation thus supports a cause of action for breach of contract.

Had VEM failed to deliver any condoms or had JIC discovered the condoms were defective before January 9, 2006, JIC would have been justified in withholding its motion to dismiss the underlying litigation. However, the fact that JIC dismissed the case did not excuse VEM from its obligation to deliver good and acceptable condoms. VEM's failure to deliver 100,000 good and acceptable condoms was a material breach of the settlement agreement.

4. *VEM's Obligation to Deliver 100,000 Good and Acceptable Condoms Was Not Extinguished by the Release*

While VEM is correct in characterizing the general purpose of a release, it fails to read the release language in the context of the agreement of which it was a

part. The release was one part of the settlement agreement, and the consideration for JIC's releasing its claims against VEM was VEM's promises in paragraph (1), including the delivery of 100,000 good and acceptable condoms. (See *Saks v. Charity Mission Baptist Church* (2001) 90 Cal.App.4th 1116, 1135 [consideration for a promise is an act or return promise bargained for and in exchange for the promise].) The release was intended to ensure that upon the completion of the promises set forth in the agreement, the parties would "resolve all disputes underlying or in any way connected with or related to [JIC's action against VEM]."

VEM's interpretation of the release renders the principal terms of the agreement meaningless, by suggesting that the parties intended to release each other regardless of whether the terms of the settlement agreement were performed as promised. We see no basis for such a tortured reading, which negates the consideration JIC received for executing the release and nullifies the promises made as part of the agreement. VEM's interpretation is contrary to the well established principle that a court should interpret a contract to make it operative and capable of being carried into effect. (*County of Humboldt v. McKee* (2008) 165 Cal.App.4th 1476, 1498; Civ. Code, § 1643.)

VEM's reliance on the express waiver of Civil Code section 1542 is also misplaced. As the trial court observed, that provision addressed only claims existing at the time of the execution of the release. Paragraph 6 included all claims which "any party does not know or suspect to exist in his/its favor at the time of the execution hereof," and was thus limited to extant claims. The release did not cover promises whose performance was not due at the time the release was executed. JIC's claim with respect to the defective condoms did not come into being until after the execution of the settlement agreement. Accordingly, the

waiver of the protections in Civil Code section 1542 does not extinguish VEM's obligation to deliver "good and acceptable" condoms.<sup>4</sup>

5. *No Provision Requires JIC to Inspect the Condoms and Reject Them at the Time of Delivery*

VEM argues that JIC was required to accept or reject the condoms at the time of delivery. Nothing in the agreement supports VEM's argument. The agreement does not specify that JIC was required to inspect the condoms in Taiwan and determine whether the condoms were good and acceptable prior to their entry into the United States. Both parties knew the condoms would be inspected upon entry into the United States and that the FDA would determine if they were defective. Although parol evidence is admissible to clarify an ambiguity and determine the parties' intent, (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.*, *supra*, 69 Cal.2d at pp. 39-40), we may not add a new provision to the parties' agreement. (See *250 L.L.C. v. PhotoPoint Corp.* (2005) 131 Cal.App.4th 703, 725; Code Civ. Proc., § 1856, subd. (b).)

6. *Conclusion*

VEM breached the terms of the settlement agreement when it failed to deliver 100,000 "good and acceptable" condoms as promised. That promise was the consideration for the release and was not extinguished by the release. The

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<sup>4</sup> The cases on which VEM relies are inapposite. All involved claims which were known or expressly contemplated at the time the release was signed. (See, e.g., *Edwards v. Comstock Insurance Co.* (1988) 205 Cal.App.3d 1164, 1168-1169 [bad faith claim against insurer known to insureds when they signed release of all claims relating to auto accident]; *Winet v. Price*, *supra*, 4 Cal.App.4th at p. 1168 [right to sue for malpractice known to plaintiff and his counsel when plaintiff executed release of all claims known and unknown]; *San Diego Hospice v. County of San Diego* (1995) 31 Cal.App.4th 1048, 1053-1054 [purchaser of property expressly contemplated possibility of discovering additional contamination when it executed release of all claims, "past, present and future, known or unknown, suspected or unsuspected"].)

agreement contained no requirement that JIC determine if the condoms were good and acceptable at the time of delivery.

**DISPOSITION**

The judgment is affirmed. JIC shall have its costs on appeal.

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MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.